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In the Supreme Court of the United States

October Term, 1980

Julian A. Penello,
Petitioner

v.

United States of America,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

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November 14, 1980

QUESTION PRESENTED FOR REVIEW

Whether there was absent the "manifest necessity" for the Trial Judge to discharge the jury and *sua sponte* declare a mistrial in this case so that a second trial will violate the petitioner's guarantee under the Fifth Amendment to the United States Constitution that he will not be put in jeopardy twice for the same offense, where the *record* shows, *without contradiction*, that the Trial Judge (a) did *not* determine from the jury, which had deliberated for only a short time, that they were hopelessly deadlocked, and (b) did *not* consider any alternatives to a mistrial.

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IN THE
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October Term 1980

No.

Julian A. Penello,

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v.

United States of America,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, JULIAN A. PENELLO prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit rendered in these proceedings on September 17, 1980.

QUESTION PRESENTED

Whether there was absent the "manifest necessity" for the Trial Judge to dis-

charge the jury and sua sponte declare a mistrial in this case so that a second trial will violate the petitioner's guarantee under the Fifth Amendment to the United States Constitution that he will not be put in jeopardy twice for the same offense, where the record shows, without contradiction, that the Trial Judge (a) did not determine from the jury, which had deliberated for only a short time, that they were hopelessly deadlocked, and (b) did not consider any alternatives to a mistrial.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit as yet unreported, appears at Appendix, infra, p. A.1. The Memorandum Order of the United States District Court, is unreported, and appears at Appendix, infra, p. A.3.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 17, 1980. See Appendix, p. A.13 infra. This Petition for Certiorari was filed less than sixty days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "...; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;..."

STATEMENT OF THE CASE

On March 12, 1979, the petitioner, Julian A. Penello, was indicted by a Federal Grand Jury within the jurisdiction of the United States District Court for the Eastern District of Virginia, Norfolk Division, under

Section 7201 of the Internal Revenue Code for attempting to defeat and evade Federal income taxes for the calendar years 1972 through 1975 inclusive, and under Section 7206(1) of the Internal Revenue Code for subscribing to false returns for the same years. A plea of "not guilty" to each of the charges was entered by the petitioner. The jury was impaneled on May 14, 1979, but the trial did not commence until 9:08 a.m. on June 11, 1979 and it then continued through June 14, 1979.

At the end of the Government's case on June 12, 1979, petitioner's counsel moved for a directed verdict of acquittal, and the Trial Judge withheld ruling on the motion pending return of a verdict. Petitioner's counsel then presented petitioner's case and after both sides had finally rested their cases,

petitioner's counsel renewed his motion for a directed verdict of acquittal. The Judge again withheld ruling on this motion pending return of a verdict. The Judge then instructed the jury and they retired to the jury room to deliberate at 2:47 p.m. on June 13, 1979. The jury was returned to the courtroom at 5:47 p.m. on June 13 when the Marshal advised the Trial Judge that the jury had not been able to arrive at a verdict. The Judge addressed the jury noting that he understood the jury had not been able to arrive at a verdict. He then asked the jury if it would be of any benefit to recess for the evening and return in the morning for further deliberation. One (1) juror asked the Judge if the jurors could consult for a moment, and the Judge agreed. After consulting one

another, the following took place:

THE JUROR: I think we'd like to try it again tomorrow, your Honor.

THE COURT: All right.

(R. p. 21)

The jury then retired (5:50 p.m.) from the courtroom for the night.

The next morning, on June 14, 1979, prior to the resumption of deliberations by the jury, petitioner's counsel asked the Trial Judge to "recharge" the jury because of the complex nature of the issues in this income tax case, but the Judge refused to do so, and the jury retired to the jury room at 9:06 a.m. to further deliberate. Petitioner's counsel then stated his objection to the Judge's ruling for the record. (R. pp. 26, 27).

Thereafter, at 10:26 a.m. the Trial Judge was notified by the Marshal that

the jury had not been able to arrive at a verdict, and, prior to reconvening the jury in the courtroom, a very brief bench conference was held at the instance of the Trial Judge with counsel for the Government and for the petitioner out of the hearing of the Court Reporter and of the petitioner. (R. p. 28). The bench conference was not recorded (R. p. 28); however, the Trial Judge advised counsel for both sides at the bench that the Marshal had reported to him that the jury had not been able to reach a verdict. The Judge then advised that he did not like to use the Allen charge, and that he did not know what else to do, but that he would first question the jury. The Judge did not solicit any agreement or a motion for a mistrial and no motion for a mistrial was made by counsel for

either side. The bench conference ended and petitioner's counsel waited to hear the Judge question the jury.

The jury was thereupon reconvened in the Courtroom at 10:28 a.m. on June 14, 1979 at which time the following took place:

THE COURT: Ladies and gentlemen of the jury, I understand from the Marshal you have not been able to arrive at a verdict.

Am I correct about that?

A JUROR: Correct.

THE COURT: I want you to thoroughly understand that the Court has no intention or desire to impose upon you in any way, but merely to say to you that we're here to be of any assistance that we can.

Do you feel that any further deliberation would be of any value to you?

Mr. Foreman, do you have a feeling that that

would be of any assistance, further time to deliberate?

THE FOREMAN: No sir.

(R. pp. 28-29)

Immediately after the above colloquy between the Judge and the "Foreman" of the jury, the Judge made some general comments to the jury and suggested that the jurors keep silent on what transpired in the jury room, thanked them for their service and discharged the jury at 10:36 a.m.

The Trial Judge discharged the jury and declared the mistrial sua sponte without the consent of or motion by petitioner's counsel or the knowledge of the petitioner, Julian A. Penello, and also without any explanation to Mr. Penello that he might be retried nor did the Trial Judge advise him of any available alternatives to the mis-

trial. (R. pp. 28-33).

After the jury was discharged, petitioner's counsel again renewed his motion for a judgment of acquittal on the grounds that the evidence introduced at the trial of this case was insufficient to sustain a conviction of the income tax offenses under Sections 7201 and 7206(1) of the Internal Revenue Code as charged in the indictment against the petitioner. The Judge delayed a hearing on said motion because he stated "the Government may decide that it does not wish to bring the matter back for a retrial and...that would end the matter". The Judge then set a ten (10) day period for the Government to make its decision regarding a retrial. On June 21, 1979 the Government notified the Court it desired to retry the petitioner, and on June 26, 1979 peti-

tioner's counsel filed a written motion for a judgment of acquittal and this motion was scheduled for a hearing in August, 1979. The record of the trial was transcribed, briefs were filed by both sides and oral argument was heard by the Court on August 27, 1979, at which time the Court ruled from the bench and denied petitioner's motion for a judgment of acquittal. The Judge at that time scheduled the retrial to begin on October 9, 1979.

On September 11, 1979 petitioner's counsel filed a Motion to Dismiss the Indictment on the ground of Double Jeopardy, together with a written brief in support thereof, and requested a hearing before the Court on this motion. On September 19, 1979 petitioner's counsel was advised that the Court would not hear oral argument on

petitioner's Motion to Dismiss the Indictment, and petitioner's counsel asked the Court on September 20, 1979 to enter its Order on this motion so that petitioner could protect his Constitutional right to be free from retrial which would be irreparably lost by the retrial set for October 9, 1979. Thereafter, on September 25, 1979 the Court entered a Memorandum Order denying petitioner's Motion to Dismiss the Indictment on the ground of Double Jeopardy, and same was filed on September 26, 1979. The petitioner on September 28, 1979 filed his Notice of Appeal to the United States Court of Appeals for the Fourth Circuit from this Final Order.

On September 17, 1980 the Fourth Circuit Court of Appeals rendered its short Per Curiam opinion and held as

follows:

> "Upon reviewing the record and consideration of the briefs and oral arguments, we believe that there existed a manifest necessity for the court to declare a mistrial in this case, that the court did not abuse its discretion in so doing, and that the defendant's Fifth Amendment guarantee against double jeopardy will not be violated by a second trial."

The petitioner now files this Petition for a Writ of Certiorari to review the Opinion and Judgment of the Fourth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with the standard of appellate review first enunciated in this Court's Perez ruling and faithfully adhered to by this Court for testing the Trial Judge's exercise of discretion in declaring a mistrial without the consent of the accused, as the record in this case is "barren" of any showing of "manifest necessity" for the mistrial ruling that would avoid petitioner's plea of double jeopardy under the Fifth Amendment to the United States Constitution.

The Fifth Amendment to the United States Constitution commands that no "person (shall) be subject for the same offence to be twice put in jeopardy of life or limb". The underlying basis of this deeply-rooted tenet of our jurisprudence is that

> "The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal in compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty".

Green v United States, 355 U.S. 184, 187-88, (1957). The protections offered by the "double jeopardy" ban include a stringent limitation on the Government's right to reprosecute after a mistrial is declared in the absence of a Motion by the accused for the mistrial. See United States v Wilson, 420

U.S. 332, 342-44, (1975); United States v Jorn, 400 U.S. 470, 485 (1971).

The authoritative starting point of the law in this field is this Court's opinion in United States v Perez, 22 U. S. (9 Wheat Ct.) 579. In Perez, Mr. Justice Story articulated the principles which have since guided the Federal Judiciary in its application of the concept of "double jeopardy" to situations giving rise to mistrials at page 579:

> "We think, that in all cases of this nature, the law has invested Courts of Justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all of the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject;" (Emphasis supplied).

This Court has on several recent occasions reitereated its strong support for the Perez doctrine of "manifest

necessity", and in United States v Jorn, supra, at page 485, it stated that this doctrine stands as a "command to Trial Judges not to foreclose the 'defendant's option' until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." United States v Jorn, supra, represents one in a line of cases which has the practical effect of narrowing the discretion of the Trial Judge to declare a mistrial. See Gori v United States, (1961), 367 U. S. 364, 81 S. Ct. 1523; and Downum v United States, (1963), 372 U.S. 734, 83 S. Ct. 1033, where the Supreme Court makes it clear that "doubt as to the validity of a Court's declaring a mistrial must be resolved in favor of the accused."

This Court has recently held that there are degress of necessity and that a "high degree" is required before a Trial Judge can conclude that a mistrial is appropriate. Arizona v Washington, 434 U.S. 497, 506 (1978). Since Perez, this Court has faithfully adhered to the "manifest necessity" standard in a variety of factual contexts.

Although this Court consistently has eschewed attempts to develop any mechanical formula by which to gauge the propriety of a mistrial, some guiding principles have emerged. The decision to declare a mistrial and dismiss the jury is not to be undertaken lightly. In Perez this Court stressed that "the power to declare a mistrial ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." The Courts, in

assessing the need to terminate the proceedings before conclusion, have been instructed to balance "a defendant's valued right to have his trial completed by a particular tribunal" with the "public's interest in fair trials designed to end in just judgments". Wade v Hunter, 336 U.S. 689-690 (1949). And this Court in several recent cases has again clearly set forth the Standard of Appellate Review for testing a Trial Judge's exercise of discretion in declaring a mistrial. In Jorn, after quoting the principles laid down in Perez for governing reprosecution after a mistrial, this Court stated at page 481:

> "The Perez case has since been applied by this Court as a Standard of Appellate Review for testing the Trial Judge's exercise of his discretion in declaring a mistrial without the defendant's consent."

And more recently in Arizona, at page 514 this Court again stated:

> "...a constitutionally protected interest is inevitably affected by any mistrial decision. The Trial Judge, therefore, 'must always temper the decision whether or not to abort the trial by considering the importance to the defendant, of being able, once and for all to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate'...In order to ensure that this interest is adequately protected, Reviewing Courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the Trial Judge exercised 'sound discretion' in declaring a mistrial." (Emphasis supplied).

A. The record in the Trial Court must reflect a manifest necessity for the mistrial ruling.

In Arizona, supra, at page 498, this Court held that a finding of double jeopardy must be based on whether the record in the Trial Court reflects the kind of necessity which justifies depriving the accused of his right to

to have his trial completed by a particular tribunal. Accord, United States v Jorn, 400 U.S. 470, 486 (1971). And even when the Trial Judge explains his reasons for declaring a mistrial, "the record must support the explicit or implicit finding of manifest necessity." See United States v Sanders (CA 9th 1979) 591 F 2d 1293 at 1299, and the cases cited therein.

The Court of Appeals below in a short PER CURIAM conclusory opinion entered on September 17, 1980 held as follows:

> "Upon reviewing the record and consideration of the briefs and oral arguments, we believe that there existed a manifest necessity for the Court to declare a mistrial in this case, that the Court did not abuse its discretion in so doing, and that the defendant's Fifth Amendment guarantee against double jeopardy will not be violated by a second trial. See United States v Jorn, (1971) 400 U.S. 470, 485-486; United States v Perez, (1824) 22 U.S. (9 Wheat) 579-580; United

States v Lansdown, (4th Cir. 1972) 460 F 2d 164, 168-169. Accordingly, the judgment of the District Court is AFFIRMED."

Clearly implicit in the opinion of the Court of Appeals and from the authorities cited in support thereof (see for example United States v Jorn, 400 U.S. 470 at pages 485-486) is the Court's determination from the record in this case that the Trial Judge acted sua sponte in declaring the mistrial. Because of this determination, the Court of Appeals had to decide whether the Trial Judge exercised a sound discretion, and it concluded that "there existed a manifest necessity for the Court to declare a mistrial in this case". It is highly significant, however, that the Court of Appeals' conclusory opinion does not set forth or even mention one (1) factor appearing in the record to support its conclusion that a "manifest

necessity" existed for the Trial Judge's sua sponte declaration of a mistrial. Petitioner submits that the reason the Court of Appeals failed to mention any specific factors or basis in its opinion in this case to show that there existed a "manifest necessity" for the Trial Judge's sua sponte declaration of the mistrial, is simply that there are "no factors or basis" in the record to support the Court's "conclusory" opinion as will be shown hereinafter.

B. The record in this case is "barren" of any showing of "manifest necessity" justifying the discharge of the jury and declaration of mistrial by the Trial Judge.

The Statement of the Case in this Petition accurately sets forth every fact appearing in the official record of this case that could have any bearing on the question presented by this Petition, namely, whether there existed a "mani-

fest necessity" for the Trial Judge's sua sponte declaration of a mistrial. However, the entire record pertaining to the Trial Judge's action in declaring a mistrial in this case is short and can easily be reviewed by this Court. (R. pp. 1-33). Petitioner submits that the record is barren of any showing of manifest necessity justifying the discharge of the jury in this case. To the contrary the record reflects the Trial Judge's total lack of awareness of the double jeopardy consequences of his action and of the manifest necessity standard. Moreover, it shows a crucial failure by the Trial Judge to consider the petitioner's protected interest in having the trial concluded in a "single" proceeding. It is abundantly plain from the record in this case that the Trial Judge abused the discretion entrusted to

him by declaring the mistrial for the following reasons:

1) The Trial Judge only assumed the jury was deadlocked.

The record shows that the Court reconvened at 10:26 a.m. on June 14, 1979 and that the Trial Judge met very briefly with counsel for both sides at the bench out of the hearing of the court reporter and the petitioner. The bench meeting was not recorded but the Trial Judge advised counsel he had learned from the Marshal that the jury had not been able to arrive at a verdict, that he did not like to use an Allen-type charge, and that he did not know what else to do, but that he would first question the jury. The Judge did not solicit any agreement or motion for a mistrial and counsel for petitioner made no Motion for a mistrial. The bench conference ended and petitioner's counsel waited

for the jury to return to the courtroom and be questioned by the Judge. There was no communication of the bench proceedings by the Judge or counsel to the petitioner.

An examination of the record in this case clearly shows that the Trial Judge discharged the jury and sua sponte declared a mistrial on the mere "assumption" that the jury had reached an impasse and would be unable to reach a verdict. There is no basis in the record for the Judge's assumption. The record shows that the jury had deliberated for a relatively short period of time (a total of only 4 hours and 17 minutes) in view of the length of the trial (approximately 4 days) when it was returned to the courtroom at 10:28 a.m. on June 14, 1979 and questioned by the Trial Judge. At that point the jury

had not been able to agree, but the record is crystal clear that the Judge did not ascertain from the jury collectively that they or even a majority of the panel believed that they were hopelessly deadlocked at that time which is the crucial factor in determining the probability of agreement. When the jury was returned to the courtroom at 10:28 a.m. on June 14, 1979, after having deliberated for only 1 hour and 22 minutes that morning, the following took place:

> THE COURT: Ladies and gentlemen of the jury, I understand from the Marshal you have not been able to arrive at a verdict.
>
> Am I correct about that?
>
> A JUROR: Correct.
>
> (R. p. 28)

The record is absolutely clear that in response to the Trial Judge's leading question above only 1 juror indicated

that the jury had been unable to arrive at a verdict up to that time. Certainly there was no indication whatever from the jury as a group or all the jurors "individually" that they were hopelessly deadlocked at that time. The Judge clearly made no effort whatever to determine how many on the jury believed there was a prospect of reaching a verdict. He did not ask the jurors any question as to the possibility of reaching a verdict. In fact there were no further questions addressed to the jury by the Judge. It is evident from this record that the Trial Judge made an insufficient attempt to determine from the jury collectively or the jurors individually whether they were merely unable to agree on a verdict up to that time and might be able to reach agreement with more time, or whether they

were, in fact, hopelessly deadlocked; to the contrary, the Judge quickly by-passed the jury and specifically asked the foreman only whether he thought more time to deliberate would be of any assistance, to-wit:

> "Mr. Foreman, do you have a feeling that that would be of any assistance, further time to deliberate?
>
> THE FOREMAN: No sir."

(R. p. 29)

There is absolutely nothing in the record of this case to show that the foreman's response to the above question represented the unanimous opinion of the jury, or even that of a majority of the panel. Clearly the foreman's response does not furnish an adequate showing that it was the collective sentiment of the jury that they had unanimously reached an impasse. Immediately after the above response from

the foreman, the Judge made a few brief comments to the jury, asked the jurors not to discuss their deliberations, etc., and, without then consulting with counsel or petitioner about any alternatives to a mistrial, or consulting with the petitioner or his counsel to determine if they had any objection to a mistrial or informing counsel, he immediately discharged the jury. The Third Circuit Court of Appeals has held that the action of a Trial Judge in declaring a mistrial violated the accused's Fifth Amendment right to be free of double jeopardy where the jury deliberated six and one-half hours, and where the Trial Judge without ascertaining from the jury that it was "deadlocked" acted "solely" on the basis of the "foreman's" responses to the Judge's leading questions as to whether

there was any hope of a verdict. United States ex rel Webb v Court of Common Pleas (CA 3rd 1975) 516 F 2d 1034, 1043, 1044. The Court of Appeals in Webb made this significant observation regarding the questioning of the jury foreman only beginning at page 1043:

> "...the Trial Judge directed his interrogatories solely to the jury foreman, and so far as the record reveals, the foreman, alone, indicated a response. The other members of the panel were in the box at this time, and it would concededly have been possible for another juror who disagreed with the foreman's assessment of the jury's status to make his opinion known to the Court. However, unanimous consent cannot be inferred from a silent record. It may be, as Judge Weis asserts, that many citizens if placed on this jury would have voiced any disagreement they may have had with the opinion expressed by the foreman. There has been no empirical showing, however, that all jurors are so self-assertive. It is at least possible that one or more of the jurors here stood sufficiently swayed by the Court's demand for orderly proceedings that they were deterred from making unsolicited comments on

> the jury's progress. In any event there is no clear showing that the foreman's responses here necessarily represented the unanimous opinion of the jury, or even that of a majority of the panel. The record, therefore, especially with regard to an adjudication affecting constitutional rights, does not furnish an adequate showing that it was the collective sentiment of the jury that they had reached an impasse." (Emphasis supplied).

The facts in Webb, supra are almost identical to the case at bar.

It is abundantly clear, as can readily be determined from a review of the short record in the case at bar, that the Trial Judge did not determine from the jurors "collectively" that they had reached such an impasse that it would be impossible for them to reach a verdict in this case. The "foreman alone" answered "no" to the Judge's leading question as to whether he felt any additional time to deliberate would be of assistance. Certainly there is

no showing on this record that the "foreman's" response necessarily represented the unanimous opinion of the jury collectively, or even that of a majority of the panel, and certainly the unanimous consent of the jury to the foreman's response cannot be inferred from this silent record.

Circumstances which have been held relevant in determining the propriety of declaring a mistrial for inability of a jury to agree include the length of the trial, the length of the jury deliberations, the complexity of the issues involved, and the jury's collective confirmation or opinion that it is hopelessly deadlocked. United States v See (CA 9th 1975) 505 F 2d 845, 851, 852, cert. den. sub nom, Gordon v United States, 420 U.S. 992 (1975).

The "crucial factor" in determining the probability of agreement by a jury is a

statement from the "jury" that it is "hopelessly deadlocked". United States v Lansdown, (CA 4th 1972) 460 F 2d 164, 169, 170. United States v See, supra, at page 851. Upon receiving a "communication from the jury stating that it cannot agree, the Trial Court must question the jury in open Court to determine independently whether "further deliberations" might overcome the deadlock. Arnold v McCarthy (CA 9th 1978) 566 F 2d 1377, 1387; United States v See, supra, at page 851. Although a poll of jurors is the preferred method in some states, questioning, the jury "as a group" on the "possibility" of a verdict is an acceptable alternative. United States v See, supra, at page 851. In many criminal cases Trial Judges have questioned the jurors "individually" in order to determine whether there is any prospect of

the jury reaching a verdict, and this procedure has been approved by various Appellate Courts. See United States v Mack (CA 7th 1957) 249 F 2d 321, 324, cert. den., 356 U.S. 920 (1958), (an income tax case); United States v Lorenzo (CA 9th 1978) 570 F 2d 294, 298, 299; United States ex rel Anthony v Sieloff (CA 7th 1977) 552 F 2d 588, 590; United States v See, supra at page 852; United States v Smoot (CA D.C. 1972) 463 F 2d 1221, 1223; Carlton v United States (CA 9th 1968) 395 F 2d 10, 11, cert. den., 393 U.S. 1030 (1969). On the other hand, it has been held that the questioning of the jury "foreman" alone as to the jury's ability to agree on the verdict is not sufficient. United States ex rel Webb v Court of Common Pleas, supra; see also Arnold v McCarthy, supra, at page 1387.

In a recent case very similar to the case at bar the Court of Appeals for the Tenth Circuit determined upon review that the Trial Judge had improperly declared a mistrial on the assumption that the jury was deadlocked. United States v Horn, (CA 10th 1978) 583 F 2d 1124. In Horn the jury foreman after three to four hours of deliberations, had sent a note to the Trial Judge that the jury was deadlocked, as a result of which the Judge on the following morning gave an Allen charge to the jury, and after more than one hour of further deliberation, the Trial Judge acting sua sponte declared a mistrial without any further inquiry of the jurors. The Court of Appeals for the Tenth Circuit reviewed and analyzed all the pertinent cases decided by this Court, including Arizona v Washington, supra, and deter-

mined that the Trial Judge's mistrial ruling was at odds with the decision of this Court in Arizona supra and of various Courts of Appeal.

The Court of Appeals then held that the Trial Judge's assumption that the jury was deadlocked was unfounded, that there was "no manifest necessity" for the mistrial, and that double jeopardy attached by reason of such erroneous declaration of a mistrial. The Court in Horn made these pertinent comments at page 1129:

> "In the case at bar there is a complete lack of evidence that the jury was in disagreement at the time that the mistrial was granted...had the Court, following the one hour plus deliberation, called the jurors back into Court and made an inquiry as to their progress, and had it asked whether they were close to a verdict, or, if deadlocked, whether all members of the jury agreed that this was the situation, then there would have been a good basis for arguing that manifest necessity existed. The

> term 'manifest' suggest apparent or that which is clear and which requires no proof, that which is open, palpable, incontrovertible. It is synonymous with evidence, visible or plain. See 2 BOV. Law Dict., Rawles' Third Edition, at 2083. It definitely does not mean something which exists only in the mind of the Judge".
>
> .....
>
> "When we consider also that the Trial Court acted sua sponte following relatively short (in time) deliberations, we are unable to uphold the decision granting the mistrial. We do add, however, that we have no doubt as to the good faith or belief of the Trial Judge that the jury was deadlocked. Regardless of this we must hold that this was insufficient." (Emphasis supplied).

It is clear that the Trial Judge in the case at bar merely assumed from questioning the foreman alone that the entire jury was genuinely deadlocked. It is submitted however, that the record in this case, especially with regard to an "adjudication affecting

constitutional rights", does not furnish an adequate showing that it was the collective sentiment of the jury that they had reached an impasse. See Webb, supra, and Horn, supra. Therefore, there was no "manifest necessity" for discharging the jury and declaring a mistrial in this case.

2) The Trial Judge did not consider any alternatives to ending the trial

In determining whether the Trial Judge exercised "sound discretion" in declaring a mistrial, the Reviewing Court must consider if there were less drastic alternatives to ending the trial. The failure to consider less severe alternatives to mistrial was held determinative by this Court in Jorn, supra, at page 487. In the recent case of Harris v Young (CA 4th 1979) 607 F 2d 1081, the Fourth Cir-

cuit Court of Appeals said at page 1085:

> "In determining whether the Trial Judge exercised sound discretion in declaring a mistrial, we must consider if there were less drastic alternatives to ending the trial "
>
> .....
>
> " We recognize the Fifth Amendment does not require a Trial Judge to make an explicit finding of "manifest necessity" before ordering a mistrial; and that he need not discuss and reject, on the record, alternatives to a mistrial. Arizona v Washington, supra, 434 U.S. at 501, 516-17. But Perez requires that we determine whether the mistrial order reflects the exercise of sound discretion. One major factor to consider in assessing the wisdom of the Trial Court's action is whether a mistrial was necessary. If obvious and adequate alternatives to aborting the trial was disregarded, this suggests the Trial Judge acted unjustifiably. Therefore, we must examine the alternatives to a mistrial. See United States v Jorn, 400 U.S. 470, 487 (1971) (plurality opinion);

United States v MacQueen, 596 F 2d 76, 82-83 (2d Cir. 1979); United States v Pierce, 593 F 2d 415, 417 (1st Cir. 1979); United States v Sanders, 591 F 2d 1293, 1299 (9th Cir. 1979); United States v McKoy, 591 F 2d 218, 222 (3d Cir. 1979); Dunkerly v Hogan, 575 F 2d 141, 146-48 (2d Cir. 1978); United States v Starling, 571 F 2d 934, 941 (5th Cir. 1978); United States v Spinella, 506 F 2d 426, 432 (5th Cir. 1973); United States v Kin Ping Cheung, 485 F 2d 689, 691 (5th Cir. 1978); United States ex rel Russo v Superior Court of New Jersey, 483 F 2d 7, 14 (3d Cir. 1973); United States v Tinney, 473 F 2d 1085, 1089 (3d Cir. 1973)."

It is submitted that the following alternatives should have been resorted to by the Trial Judge before declaring a mistrial in this case:

(a) Alternative 1 - The Trial Judge Should Have Instructed the Jury To Deliberate Further

As discussed hereinbefore, the record shows that this trial last about four (4) days, yet the jury only deliberated for a total of 4 hours and 17

minutes. The record further shows that the Trial Judge did not determine that the jury collectively was at an impasse and hopelessly deadlocked at the time he discharged them and sua sponte declared the mistrial. It is abundantly clear therefore that the Trial Judge should have allowed further deliberation by the jury in this case.

In determining whether a Trial Judge has abused his discretion in declaring a mistrial because of a hung jury, the Courts have isolated some significant factors. The Trial Judge must determine whether there is a probability that the jury can reach a verdict within a reasonable time. United States v See, supra, at page 851. In See, supra, the Ninth Circuit Court of Appeals set forth the factors to be

considered at pages 851 and 852:

> "The 'crucial factor' in determining the probability of agreement is a statement from the jury that it is 'hopelessly deadlocked'. United States v Lansdown 460 F 2d 164, 170 (4th Circuit 1972).
>
> A statement by the jury that it is currently deadlocked has been held as insufficient ground for declaring a mistrial. The Judge should question the jury in such circumstances, either individually or through its foreman on the possibility that its current deadlock could be overcome by further deliberations.
>
> Although a poll of jurors is a preferred method to some states, questioning the jury as a group on the possibility of a verdict is an acceptable alternative..."
>
> .....
>
> "The length of the trial and the complexity of the issues facing the jury are also elements to be examined by the Trial Judge.
>
> The time taken in deliberations by the jury is also a significant factor to be evaluated by the Trial Judge, although no fixed standards have been set.
>
> The American Bar Association study, Trial by Jury, concluded

> that 'the minimum deliberation time should depend at least in part upon the length of the trial', at 157. It noted that in trials lasting 3-5 days, juries which were hung took an average of approximately 3 times as much time (10.8 hours) as juries which reached a verdict (3.7 hours), citing Kalven & Ziesel, The American Jury 459 (1966)."

The time of deliberation by the jury in the instance case was less than half of the time spent by juries in cases of similar length based on the study by the American Bar Association referred to in the See case, supra. See also the case of United States v Lansdown, supra, in which the Fourth Circuit Court of Appeals held, where the jury had deliberated approximately 11 hours and had not indicated that it was hopelessly deadlocked, that the Trial Judge abused his discretion in declaring a mistrial.

In Arizona v Washington, supra, Mr.

Justice Stevens specifically commented on the significance of the Trial Judge's failure to allow further deliberations by the jury where it may be possible to reach a fair verdict, at page 509:

> "...if he (Trial Judge) discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his 'valued right to have his trial completed by a particular tribunal'."

In the recent Horn case, supra, the Tenth Circuit Court of Appeals has held that double jeopardy attached by reason of an erroneous declaration of a mistrial by the Trial Judge where he had not determined that all members of the jury were in agreement that they were hopelessly deadlocked, and he failed to allow the jury to deliberate further. And even where the jury collectively has indicated to the Court

that they are completely deadlocked, it has been held proper for the Trial Judge to ask the jury to deliberate further before declaring a mistrial where the manner of so doing was not coercive. Walsh v U.S. (CA 9th 1967) 371 F 2d 135, 136; U.S. v Winn (CA 10th 1969) 411 F 2d 415, 417, cert. den. 396 U.S. 919 (1969).

In the instant case, the jury had only deliberated a relatively short period of time and they had not expressed their collective opinion that they were at an impasse and hopelessly deadlocked. Clearly the Trial Judge should have directed the jury to deliberate further in these circumstances.

Based on the record and in view of the authorities cited herein, it is submitted that the Trial Judge clearly

abused his discretion in not instructing the jury to deliberate further in this case.

(b) Alternative 2 - The Trial Judge Should Have Given The Jury An Allen-Type Charge If Further Deliberation Had Not Resulted In A Verdict

The Courts of Appeal in many circuits have approved of the Trial Judge giving an Allen-type charge to the jury to encourage a verdict in the face of an apparent deadlock, absent coercive circumstances. United States v Bowles (CA 2nd 1970) 428 F 2d 592, cert. den. 400 U.S. 928; United States v Horn, supra; United States v Lansdown, supra; United States v Irwin (CA 1st 1979) 593 F 2d 138; United States v Jennings (CA 2d 1973) 471 F 2d 1310, 1313, 1314, cert. den. 396 U.S. 919 (1973); and United States v Bear Killer (CA 8th 1976) 534 F 2d 1253, 1261, 1262. In Bowles, supra,

the Second Circuit Court of Appeals, in approving an Allen-type instruction to the jury, commented at page 596:

> "The very purpose of a properly worded supplemental charge is to encourage jury agreement. This court has repeatedly emphasized that "[t]he considerable costs in money and time to both sides if a retrial is necessary certainly justify an instruction to the jury that if it is possible for them to reach a unanimous verdict without any juror yielding a conscientious conviction which he or she may have, they should do so..."
>
> .....
>
> And at footnote 12:
>
> "If the jury is ultimately unable to agree, they may report a disagreement; yet their primary responsibility remains, where possible, to reach a verdict. At early common law, the jury was expected to reach a unanimous verdict, no matter how long the process took."

In Irwin, supra, the First Circuit Court of Appeals, in an income tax evasion case similar to the case at

bar, held that it was proper for the Trial Judge to give an Allen-type charge to the jury after the jury foreman notified the Marshal who then advised the Judge that he was doubtful the jury could reach a verdict.

A recent decision following Arizona v Washington supra was handed down in the case of United States ex rel Van Pelt v Warden (N.D. Ill. 1978) 461 F Supp 618 On remand from the Court of Appeals, 549 F 2d 805, the United States District Court held that a mistrial was not properly declared by the Trial Judge who acted upon his own belief rather than actual facts and who did not canvass alternatives and make a record that showed the basis for his action so that it could be reviewed and thus the defendant was entitled to a Writ of Habeas Corpus.

In the Warden case supra the jury had deliberated for about five and one-half hours, and the baliff told the Trial Judge, according to the foreman, the jury was unable to agree on a verdict. This purported deadlock was not a part of the Trial Court record, although defendant's attorney was advised of it. The Trial Court then declared a mistrial. The District Court in Warden made the following pertinent comments about the Trial Judge's declaration of a mistrial, at page 620:

> "The foregoing indicates that the trial judge did not properly exercise his discretion if the basis for his decision was a deadlocked jury. He made no formal inquiry of the foreman, he did not ask the parties to agree or the defendant to move for a mistrial, he did not consider the alternative of allowing the jury to take a recess and resume deliberations the following day (at least by agreement), nor did he give the State equivalent of an Allen or even a Silvern instruction."

If, when the jury was returned to the courtroom at 10:28 a.m. on the morning of June 14, 1979, and only one (1) juror indicated that the jury was unable to agree at that time, the Trial Judge had sent the jury back for further deliberations, and if the jury, after they had deliberated for a further reasonable period of time, still had been unable to reach a verdict, the Trial Judge should then have given the jury a supplemental instruction such as an Allen-type charge, as an alternative to discharging the jury and sua sponte declaring a mistrial. The "record" in this case shows that the Trial Judge did not use this reasonable alternative, and therefore, he abused his discretion in declaring a mistrial.

(c) Alternative 3 - The Trial Judge Could Have Reinstructed The Jury As Requested By Petitioner's Counsel

This is a complex income tax case involving the determination by the jury of whether certain amounts received by petitioner constituted nontaxable gifts or taxable income where no reported case involving the same or similar facts has ever decided this question and petitioner therefore contends that as a "matter of law" he could not be guilty of "wilfully" intending to evade income taxes on such amounts, (see for example United States v Critzer, (CA 4th 1974) 498 F 2d 1160); and also involving the deferment of income taxes on earnings from fishing "set aside" by petitioner to purchase an engine for his fishing vessel pursuant to the Capital Construction Fund Law (Section 607 of the Merchant Marine Act as amended by P.L.

91-469) enacted by Congress in 1970 for the specific purpose of benefiting fishermen like the petitioner by deferring income taxes on the earnings from his fishing vessel.

Because of the complex nature of the issues to be resolved by the jury in this income tax case, and the lengthy and detailed charges to the jury, petitioner's counsel requested the Court to "recharge" the jury when they returned to the courtroom at 9:05 a.m. on the morning of June 14, 1979 and before retiring to resume deliberations. The Trial Court refused to do this, and the jury retired to the jury room at 9:06 a.m. to resume deliberations. Petitioner's counsel then recorded his objection to the Court's ruling. (R. pp. 26, 27).

As a general rule the necessity, extent and character of additional instructions

are matters within the discretion of the Trial Judge, United States v Miller, (CA 9th 1976), 546 F 2d 320, 324. It is submitted however, that another reasonable alternative to the mistrial would have been for the Trial Judge to have asked the jury collectively whether or not it would have been helpful to have the original instructions given to them again in this complex income tax case. This is particularly true in the Federal Court since the instructions are oral, and the jury may have been uncertain as to the tax laws to be applied to the evidence presented at the trial.

Again the Trial Judge failed to consider a reasonable "alternative" to a mistrial in this case. It is clear from this record that the Trial Judge was not fully aware of the manifest necessity

standard first enunciated by this Court in Perez, supra, 156 years ago. In the recent case of United States v Starling (CA 5th 1978) 571 F 2d 934, the Fifth Circuit Court of Appeals reviewed the latest rulings of this Court regarding the manifest necessity doctrine, and made these important observations:

> "The protections offered by the double jeopardy ban include a stringent limitation on the government's right to reprosecute after a mistrial is declared without the consent of the accused. See United States v Wilson, 420 U.S. 332, 342-44, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975)" Id. at 937
>
> "'...reviewing courts have an obligation to satisfy themselves that...the trial judge exercised 'sound discretion' in declaring a mistrial.' Arizona v Washington, at 514, 98 S. Ct. at 835, quoting United States v Perez, 22 U.S. at 579; United States v Jorn, 400 U.S. 470, 485, 91 S. Ct. 547, 27 L.Ed.2d 543 (1971). In particular we must insure that the district court kept in the forefront the defendant's valued right

'of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.'" Id. at 938

The Court in Starling, supra, concluded its opinion with the following pertinent comments which we submit are applicable to the case at bar:

"...No alternatives to a mistrial were considered. Indeed, 'had...the defendant (been disposed) to object to the discharge of the jury, there would have been no opportunity to do so.' United States v Jorn, 400 U.S. at 487, 91 S. Ct. at 558. The record reflects a total lack of awareness of the double-jeopardy consequences of the court's action and of the manifest necessity standard. Moreover, it shows a crucial failure to consider the appellant's protected interest in having the trial conclude in a single proceeding..."

"We think it abundantly plain that the district court abused the discretion entrusted it by declaring a mistrial. We therefore hold that a second prosecution of appellant is constitu-

tionally barred and that the court erred in refusing to dismiss the indictment. REVERSED and RENDERED." Id. at page 941.

CONCLUSION

The record in this case clearly reveals that the Trial Judge did not determine from the jury collectively at any time that they were "hopelessly deadlocked". Indeed the Judge did not even obtain the foreman's opinion that the jury was "hopelessly deadlocked". Since the Trial Judge failed to have the jury deliberate until they either reached a verdict or became hopelessly deadlocked, and as he also failed to consider any "alternatives" to a mistrial, such as giving the jury an Allen-type charge or reinstructing the jury as requested by petitioner's counsel, the record in this case is barren of the "manifest necessity" which is required to justify

the Trial Court's sua sponte declaration of a mistrial. Therefore a second trial would clearly violate the petitioner's Fifth Amendment guarantee against double jeopardy. This Court in Arizona v Washington, supra, concluded at page 505 that "the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one". Here the petitioner has borne his burden, by making a clear showing of constitutional deprivation. See United States ex rel Van Pelt v Warden, supra, at page 621.

For the reasons expressed in this Petition, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of

Appeals for the Fourth Circuit.

Respectfully Submitted,

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November 14, 1980

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5268

United States of America,

Appellee,

-versus-

Julian A. Penello,

Appellant.

Argued: 5/9/80 Decided: 9/17/80

PER CURIAM:

The defendant/appellant was indicted for tax evasion and subscribing to false returns in violation of 26 U.S.C. §§ 7201, 7206(1). His jury trial resulted in a mistrial after the court was informed by the jury that it was unable to reach a verdict, and that further deliberation would be of no benefit. The defendant has appealed contending that there was absent a manifest necessity

for the court to declare a mistrial, and that a retrial would violate defendant's Fifth Amendment protection against double jeopardy.

Upon reviewing the record and consideration of the briefs and oral arguments we believe that there existed a manifest necessity for the court to declare a mistrial in this case, that the court did not abuse its discretion in so doing and that the defendant's Fifth Amendment guarantee against double jeopardy will not be violated by a second trial. See United States v Jorn, (1971) 400 U.S. 470, 485-486; United States v Perez, (1824) 22 U.S. (9 Wheat) 579, 580; United States v Lansdown, (4th Cir. 1972) 460 F 2d 164, 168-169. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

United States of America

v.

Julian A. Penello

CRIMINAL
ACTION
NO. 79-31-N

MEMORANDUM ORDER

This case was tried to the jury. The jury, after a number of hours of deliberation was unable to agree, and by agreement of counsel, the Court declared a mistrial and dismissed the jury. Thereupon, defendant moved the Court for summary judgment. The record was transcribed, each side filed written briefs, the Court heard oral argument on August 21, 1979, and thereafter denied the motion. The matter is scheduled for retrial to the jury for October 9, 1979.

On September 11, 1979, defendant, by a written motion, again moved the Court to dismiss the indictment and enter a judgment of acquittal on the ground that defendant was being a second time put in jeopardy for the same offense. The gist of the motion is that the Court should not have declared a mistrial and discharged the jury.

On or about September 20th, counsel for defendant requested that oral argument be granted on the September 11th motion. The Court declined to do so for the reason the same issue had been presented to, argued and ruled on by the Court on August 21st, 1979. After the Court declined to again reconsider the motion, defendant's counsel forwarded to the Court a written brief in support of said motion.

The transcript of the proceedings is

before the Court. The statement of facts set out in the defendant's brief as to the discharge of the jury is not in accord with the record and the facts. The record discloses that argument of counsel and the charge of the Court were concluded on June 13, 1979 at 2:47 p.m. After giving counsel an opportunity to record any further objections to the charge, the Court directed the jury to commence deliberation. At 2:51 p.m. the Court recessed pending a return of the jury. Almost immediately the jury requested they be furnished with a copy of the indictment in this case. By agreement of counsel, the original indictment was delivered to the jury for their use.

At 4:42 p.m. the Court reconvened to advise counsel a question had been sent in from the jury. After discussion, it was the opinion the answer

to the question was in the record. The court reporter was requested to review his notes and find the item in question. Having found the item, the jury returned to the courtroom at 5:02 p.m. The item in question was read to the jury and they returned to the jury room at 5:07 to resume deliberation. Counsel were requested to state any objections they might have to the procedure followed or any comment of the Court, but stated none.

At 5:45 the Court reconvened after having received word the jury was unable to agree on a verdict. The jury was asked whether it felt further time to deliberate would be of benefit. Upon being advised it would like to reconvene the following morning, at 5:50 p.m. the jury, after being warned not to discuss the matter with anyone, was re-

cessed to return at 9:00 o'clock a.m. the next morning. Again the Court gave counsel an opportunity to state any objection. None was stated.

On January 14th the jury appeared and, after roll call, was permitted to retire for further deliberation. At 10:26 the Court reconvened and at a bench conference advised counsel the jury had sent word it could not agree. Counsel agreed a mistrial was in order and the jury should be discharged. The Court inquired of the jury whether further deliberation would be beneficial. Upon being advised further deliberation would be of no avail, and counsel having agreed, the jury was discharged. No exception was stated and no issue was raised as to the propriety of discharging the jury. Not until receipt of the defendant's brief on September

24th was any question raised concerning the declaration of a mistrial. The statement in the brief that the Court "without consulting counsel for the defendant or giving defendant the opportunity to object, dismissed the jury," is absolutely contrary to the facts. The record shows that when the Court received word the jury could not agree, court was reconvened at 10:26. Counsel were called to the bench and advised of this fact and asked whether the Court should discharge the jury. Counsel for the government and for defendant agreed there was nothing else the Court should do and that the jury should be discharged. The correctness of this fact is established in the record by two events. First, defendant took no exception at the time the jury was discharged. Defendant only urged the Court

to then grant the motion for summary judgment or a verdict of acquittal. Secondly, at the time of argument on the motion for summary judgment on August 21st, counsel for defendant prefaced his remarks on the issue of double jeopardy by saying there was no complaint of the action of the court in declaring a mistrial and discharging the jury, as it was agreed to and no exception had been taken to the action of the Court. In light of the true facts, it is shocking to read from defendant's brief submitted September 24th, that the Court discharged the jury without consulting counsel for defendant.

But even if it be conceded defendant's counsel did not agree that the jury should be discharged, counsel took no exception to the action. It was perfectly plain the jury, after proper deliberation, reported it was unable to

agree. When asked if further time to deliberate would be of benefit, no juror responded that it would. When no response was made by any juror to that question, the Court then asked the foreman if further deliberation would benefit, and he responded in the negative. The jury having on the previous evening reported it was unable to agree, and having been requested to return the next morning in a further effort to reach a verdict, had had a full opportunity to deliberate. Like in United States v Sanford, 429 U.S. 14, 97 S.Ct. 20 (1976), the trial terminated in a mistrial granted by the Court. The Court in Sanford set forth the test thusly -

> Where the trial is terminated in this manner, the classical test for determining whether the defendants may be retired without violating the Double Jeopardy Clause is stated in Mr. Justice Story's opinion for this Court in United States v Perez, 9 Wheat, 579 580, 6 L.Ed. 165 (1824):

"We are of opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."

The Government's right to retry the defendant, after a mistrial, in the face of his claim of double jeopardy is generally governed by the test laid down in Perez supra. The situation of a hung jury presented here is precisely the situation that was presented in Perez, supra, and therefore the Double Jeopardy Clause does not bar retrial of these respondents on the indictment which had been returned against them.

And in Arizona v Washington, 434 U.S. 497, 98 S. Ct. 824, at 832 (1978), the Court in dealing with the duty of the Court to declare a mistrial because the jury is unable to agree said:

But if he fails to discharge a jury which is unable to

> reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors. If retrial of the defendant were barred whenever an appellate court views the "necessity" for a mistrial differently than the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments.

The renewed motion is thereford again DENIED.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia

September 25, 1979

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE

FOURTH CIRCUIT

No. 79-5268

United States of America,

Appellee,

vs.

Julian A. Penello,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this

Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate II
Clerk

Filed

September 17, 1980

U.S. Court of Appeal
Fourth Circuit